

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL **77-1472**

989

United States Court of Appeals For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

HAROLD WOODFORD,

Appellant.

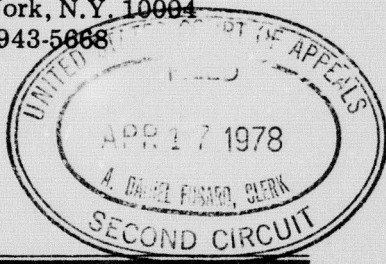
*On Appeal From the United States District Court
For The Southern District of New York*

APPELLANT'S BRIEF

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P/S

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DAVID SEGAL
Attorney for Defendant-Appellant
11th Broadway
New York, N.Y. 10004
(212) 943-5068



Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel. (212) 417-5358

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**UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

Appellee.

-against-

HAROLD WOODFORD,

Appellant.

**BRIEF FOR APPELLANT
HAROLD WOODFORD**

PRELIMINARY STATEMENT

This is an appeal undertaken by the above named appellant from a judgment of conviction rendered in the United States District Court, Southern District of New York (Honorable Dudley B. Bonsal, United States District Court Judge, Southern District of New York) under two counts of the indictment based on 21 U.S.C. 812, 841(a)(1) and 841 (b) (1) (A) and 18 U.S.C. 2, namely, the unlawful distribution and possession with intent to distribute narcotics, namely, heroin, as alleged in said counts.

As a consequence, the appellant was sentenced to an eight-year jail term under each and every count of the indictment, to be served concurrently and additionally, a mandatory special parole term of six (6) years following the appellant's service of the sentences as aforesaid.

Counsel represents the appellant under the Criminal Justice Act.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Was the appellant adequately represented by counsel at the trial in that trial counsel made no application to suppress the appellant's past criminal record, thus enabling the prosecutor to utilize past convictions specified by the appellant to impeach his credibility, when he testified in his own behalf?

2. Did appellant have effective assistance of counsel in that (a) a defense witness was called and testified and trial counsel knew that the Government had a taped conversation participated in by that witness with a Government agent, which implicated the appellant and established that the witness' testimony was not truthful; and (b) furthermore, the Government was allowed to introduce a tape recording in rebuttal to impeach a defense witness where the subject matter and the hearsay in the tape related to a collateral issue?

3. That the requirements of *Anders v. California*, 386 U.S. 738, have been complied with.

STATEMENT OF THE CASE AGAINST THE APPELLANT HAROLD WOODFORD

THE FACTS

The Government called its first witness named Lucille Williams (21).^{*} Williams lived in the Bronx with Herman Howell her common law husband (21, 22). On May 5, 1977, Williams plead guilty to selling heroin and in exchange, the Government agreed to speak up for her on sentence (24).

^{*}() This refers to the pages of the trial testimony.

Williams knew the defendant for ten or fifteen years (24), from a neighborhood drug control program (25), where the defendant was a director (25).

Williams testified that four or five years ago, she got heroin for a friend from the defendant (26).

Four or five days after January 14, 1977 Williams bought two (2) ounces of heroin from the defendant, with money she had obtained from Bob who was her husband's friend at 312 or 314 West 113th Street (28, 29, 30, 31). The defendant gave Williams a spoon of heroin and loaned her \$20.00 (34).

Whenever Williams called the defendant, the phone number was 865-1115 (35).

There came a second time, five or six days later, that Williams purchased four ounces of heroin from the defendant, at West 113th Street (38). She was accompanied to the location by Bob (38) who gave her over Two Thousand Dollars for the heroin (41).

The defendant gave Williams four ounces of heroin and one ounce for herself (41, 42).

On March 15, 1977 Williams was to buy ten ounces of heroin from the defendant for Jack, who was supposed to be a friend of Bob's (44, 45). However, the purchase never took place and Williams and Howell were arrested on the evening of March 15, 1977 (47).

Williams first met the defendant in 1965 (54).

At the time of the first sale, the only persons present were the defendant and Williams (62). Williams' husband worked for the defendant beginning in January 1977 (63).

Williams' sister, Donna Williams, had a child out of wedlock, with the defendant (74).

The Government's second witness was special agent John E. Daniocek (78), who testified that he instituted an investigation into drug trafficking by a man known as Harold, due to information from a confidential informant named Bob (78, 79).

Surveillance was instituted on January 18, 1977, at West 113th Street, between Eighth and Manhattan Avenues (79). On January 18th, Agent Daniocek met with Bob, who placed a call to Lucille Williams and then hid a recording device on Bob (81).

Daniocek took Bob to the Bronx where he activated the recorder and gave him Fifteen Hundred (\$1,500.) Dollars for the purchase of two ounces of heroin (82). Bob entered 1060 Sherman Avenue, and later exited with Herman Howell and then both were joined by Lucille Williams (82, 83).

Daniocek saw Williams walk east on West 113th Street and out of his view (85). He observed her for approximately one hour and a half (85). Miss Williams, after walking back and forth to the informant's car three times, re-enters the car (86). Bob leaves Howell and Williams off and meets with Daniocek to whom he gives two plastic bags of brown powder, which is field tested and the results were positive for heroin (87).

On January 26, 1977 Bob again met with Daniocek who placed a recorder on his person and gave him Six Thousand Four Hundred (\$6,400) Dollars (91). Bob again is taken to the Bronx, where he enters 1060 Sherman Avenue and exits with Lucille Williams (91). Bob and Williams take a cab to West 113th Street and Manhattan Avenue (92). Bob stays in the cab, Williams exits and walks into the block of West 113th Street where she is out of view (92).

Williams returns to the cab which has been waiting, re-enters and then Bob exits (93). Daniocek meets with Bob and retrieves the recorder and four plastic bags of a brown powder which were field tested with a positive result for heroin (94).

On February 15, 1977, Daniocek, pursuant to a search warrant, searched 307 West 113th Street and found the defendant's private telephone book (97), which contained the name Lucille 992-2807 (100).

On March 15, 1977 Daniocek met with Williams and Howell to try to purchase ten ounces of heroin but without success (103, 104). Williams and Howell were placed under arrest, advised of their rights and Williams said she was to get the ten ounces of heroin from the defendant at West 139 Street and Lenox Avenue (105).

On March 15, 1977, the defendant was arrested and after being advised of his rights, stated that he was to introduce Williams to a John Middleton who would deliver ten ounces to her (107). A tin foil packet of cocaine was found on the defendant (108).

Agent Daniocek testified that he found the private telephone book on the defendant on March 15, 1977 not February 15, 1977 (125).

Daniocek never saw the two drug transactions between Bob and Williams (136), and had no personal knowledge of what Williams did (137).

Special Agent Pavichevich testified that he was part of the surveillance team (142) on January 18 and January 26, 1977.

On January 27, 1977 Pavichevich observed a brown Toronado with Pennsylvania plates parked in front of 307 West 113th Street (150).

Pavichevich never saw the defendant and Williams together (153).

Special Agent Alexander Smith testified that he was part of the surveillance team on January 18, 1977 (153). That he checked the mailboxes in 307 West 113th Street and saw the names Harwood Realty and Kilpatrick (the defendant's other name) on said boxes (157). Smith observed the defendant leave 307 West 113th Street, go into 310 West 113th Street and then return to 307 West 113th Street (156) and saw the defendant enter a brown Toronado (157).

Smith participated in the February 15, 1977 search (162) and found a plastic bag with white powder and three

glassine envelopes of cocaine (163). Drug paraphernalia were found in a desk drawer (165).

Special Agent Curtis Filmore testified that he was part of the surveillance team on January 26, 1977 (173) and observed the defendant in the area of 307 West 113th Street (175) and driving a brown Toronado (176). Filmore found a tin foil of cocaine on the defendant (182).

THE DEFENSE

The defense consisted of the testimony of the defendant, who testified that he had been convicted of possession of narcotics three times before (196, 197). The defendant met Williams in 1969 (198). The defendant bought buildings from the Department of Real Estate in 1974 to renovate (200). The buildings were 307, 308, 310 and 312 West 113th Street (201).

The defendant had a child with Lucille Williams' sister (204). The defendant hired Herman Howell as a roustabout (205). Lucille Williams became vindictive toward the defendant after learning that her sister had his child (210).

The defendant testified that 307 West 113th Street was his headquarters in the construction business (212). The defendant admitted he sometimes drove a brown Oldsmobile belonging to his nephew (214).

The defendant testified that he never sold drugs to Williams in January 1977 (228).

The defense called Herman Howell who testified that he lived with Lucille Williams at 1060 Sherman Avenue and worked for the defendant (260).

In December 1976 Howell got a quantity of heroin (268) of which he used some and sold some (269).

Howell stated that he never got any narcotics from the defendant, nor did the defendant sell any or offer to sell any narcotics (270).

On cross-examination, Howell denies that he told Jack Diaz about the defendant's narcotics dealings (273, 274) but admitted that he plead to possession with intent to distribute heroin on January 18 and 26, 1977 (272).

Ruby Holmes testified that she was the defendant's bookkeeper at Harkel Contracting Corp. and Harwood Realty Corp. located at 307 West 113th Street (280). She testified that the defendant never used the two desks in the office (286) and that Lucille Williams called the office and visited it to see and talk to Howell (291, 292).

Holmes testified that the strong box (metal box) was in the premises in January and February because it was being stored for someone who never returned for it (295).

GOVERNMENT'S REBUTTAL

The Government recalled Agent Daniocek who testified that he used the name Jack Diaz when he spoke to Herman Howell at the Holiday Inn (303, 304). Daniocek was wearing a Nagra recorder (306). The conversation centered around the defendant (307). The tape was played in Court (308-315). The name Harold Woodford and Harold Kilpatrick was mentioned as well as the amount of business and the house number 310 West 113th Street.

The second rebuttal witness was William Modesto, a New York City Police Department detective who testified that in 1963 he purchased 25 glassine envelopes of heroin from the defendant (320).

POINT I

APPELLANT WAS NOT ADEQUATELY REPRESENTED AT THE TRIAL IN THAT TRIAL COUNSEL MADE NO APPLICATION TO SUPPRESS THE APPELLANT'S PAST CRIMINAL RECORD, THUS ENABLING THE PROSECUTOR TO UTILIZE PAST CONVICTIONS SPECIFIED BY THE APPELLANT TO IMPEACH HIS CREDIBILITY WHEN HE TESTIFIED IN HIS OWN BEHALF

A reading of the facts discloses that counsel for the appellant never moved to suppress appellant's past record. It is quite true that the appellant infringed various laws and had prior convictions. Not having made a motion to suppress the appellant's past record, counsel, at the very outset of the direct examination, brought out that the appellant was convicted in 1958 of illegal possession of narcotics, as well as in 1963. Counsel also got a disclosure from the appellant, on direct examination, that appellant was released from jail for the last time on August 9, 1969.

The record discloses no application to suppress these ancient convictions.

Present counsel recognizes that this is a difficult issue. However, the Federal Rules of Evidence, Rule 609 (a) (2) allows impeachment of a defendant's testimony by evidence of prior criminal convictions, if the crime involved related to dishonesty, police statements, or if the crime is punishable by imprisonment in excess of one (1) year. However, it also has to be shown, usually by the Government who utilizes this evidentiary device to impeach, that the probative value outweighs the prejudicial effect as to the defendant; see Rule 609 Federal Rules of Evidence (a) (1).

In *U.S. v. Smith*, 551 F 2d 348, at p. 359-360, (1976) holds that Rule 609 shifts to the prosecution the burden of proving that the probity of disclosing a defendant's lack of credibility outweighs the prejudice to the defense. See also *U.S. v. Mahone*, 537 F 2d 922, at p. 929 (7th Cir. 1976) cert. denied 429 U.S. 1025. Furthermore, Rule 403 of the Federal Rules of Evidence clearly provides that any evidence may be excluded if the prejudice outweighs the probity.

That the factors to be considered under the balancing process, namely, the defendant's past conviction record, the similarity of the prior crimes and the crimes charged under the indictment, must be weighed together to determine if the prejudice flowing to the defendant from the introduction of the prior crimes outweighs the probity.

Furthermore, this troublesome issue is fully explored in *U.S. v. Ortiz*, 533 F 2d 782 (2nd Cir. 1977). The panel in that case was not unanimous. It appeared that unlike in the present case, the defendant made a timely motion prior to trial to suppress the record of his past convictions. That motion was denied. The defendant, unlike the appellant here, chose not to testify. The Court, there, did hold that a person who was convicted of peddling narcotics, duly lived a life of deception and that the motion could be properly denied. However, this Court also held that there would have to be sensitive consideration where the prior conviction and the crime alleged in the indictment related to the same type of offense.

However, counsel apparently did not make this motion and consequently, there was no balancing and the Government can very easily respond to this argument, that it was not raised and should not be entertained.

Consequently, it would seem that at the very least, this Court should remand this case to the trial court so that an evidentiary hearing may be held to consider whether the appellant was advised by counsel that a motion could be

made, prior to trial, to suppress prior convictions, thereby enabling a defendant, such as appellant here, to make a reasoned choice to testify in his own behalf or to remain silent. Both these rights are constitutional rights and an election between them has to be (1) based on knowledge of the rights and (2) the consequences of the exercise thereof.

Furthermore, notwithstanding the numerosity of the Government witnesses presented, reduced to the strict essentials of the Government's case, there was only one witness to the transaction involved herein and that witness was a narcotics addict who was charged with the same offense, based on the same occurrence underlying appellant's conviction.

POINT II

THE APPELLANT DID NOT HAVE THE EFFECTIVE ASSISTANCE OF COUNSEL IN THAT (a) A DEFENSE WITNESS WAS CALLED AND TESTIFIED AND TRIAL COUNSEL KNEW THAT THE GOVERNMENT HAD A TAPED CONVERSATION PARTICIPATED IN BY THAT WITNESS WITH A GOVERNMENT AGENT, WHICH IMPLICATED THE APPELLANT AND ESTABLISHED THAT THE WITNESS' TESTIMONY WAS NOT TRUTHFUL; AND (b) FURTHERMORE, THE GOVERNMENT WAS ALLOWED TO INTRODUCE A TAPE RECORDING IN REBUTTAL, TO IMPEACH A DEFENSE WITNESS WHERE THE SUBJECT MATTER AND THE HEARSAY IN THE TAPE RELATED TO A COLLATERAL ISSUE.

The factual basis underlying this claim consists of the fact that the appellant's trial counsel called a witness

named Herman Howell who was also involved in the occurrence (259, 260). His testimony was to the effect that the appellant never bought narcotics from him, nor ever sold him any narcotics (269, 270).

It will also be recalled that Howell was living with Lucille Williams, the Government's sole witness who allegedly transacted with the appellant.

On direct examination, Howell also stated that he supplied narcotics to Lucille Williams. It would appear, that the purpose of this testimony was to show that Lucille Williams had a supplier of narcotics other than the appellant (263, 266).

The cross-examination of Howell commences on page 271 of the minutes. He was asked whether he ever had a discussion with a Jack Diaz at a motel concerning the appellant's involvement. He denied recalling and even denied talking to Diaz in regard to whether the appellant stored heroin at certain premises he allegedly controlled (273, 274).

It would seem that the cross-examiner was bound by the answers of this defense witness. This completed the appellant's case.

Then the Government, in rebuttal, produced the testimony of one, John L. Daniocek (302) a Government agent. He testified that he was known as Jack Diaz; that he was an undercover agent and that he met Howell at a motel in New York City and that he and Howell had a conversation concerning the appellant's involvement with narcotics (304-305). Of course, this conversation was taped and the Government introduced the contents of the tape recording into evidence (308-315).

The record is confusing as to whether counsel ever heard these tapes. On page 300 of the record, counsel was asked if he ever heard the tapes and he said he had heard tapes. On page 301 he was asked if he had ever heard the tapes in question but he stated he did not know. Yet

Government counsel pointed out that since July 18th preceding the trial, counsel had had tapes, including the one in question. The Court noted that counsel said he heard the tapes.

While present counsel recognizes that on an appeal there may be one strategy and on trial another, present counsel for appellant fails to understand how a witness such as Howell could be put on the stand in behalf of the defendant.

Furthermore, it is submitted that the tape recording itself was pure hearsay. It was played after Howell had testified. Trial counsel made no object to this procedure.

For a definition of hearsay, see Rule 801 of the Federal Rules of Evidence (c).

Even if this were not hearsay, under subdivision d(1) of Rule 801, counsel put himself in a position where, if the Government played the tapes while Howell was testifying under cross-examination, counsel would hardly have been in a position to cross-examine Howell, his own witness, in order to obviate the problem of confrontation proceedings with the hearsay.

Counsel recognizes that in this circuit, the test of adequate representation by counsel is that the representation has to shock the conscience of the Court and make the proceeding a farce and a mockery of justice. *U.S. v. Wight*, 176 F 2d 376, 379 (2nd Cir., 1949), cert. denied 338 U.S. 950. See also *U.S.A. v. Louis Morales*, U.S. Ct. Appeals, 2nd Circuit, decided November 16, 1977. It is submitted that this test may not be confused with the ruling in *McMann, Warden et al vs. Richardson*, 397 U.S. 759 (1970). However, whatever view is adopted, it is respectfully submitted that under the stringent standard of Morales, there should be a reversal of the conviction.

See also 15 American Criminal Law Review 109.

POINT III

THAT THE REQUIREMENTS OF ANDERS V. CALIFORNIA, 386 U.S. 738, HAVE BEEN COMPLIED WITH.

Counsel has endeavored to comply with his obligation to the appellant. Counsel has set forth the facts herein as well as what he thinks are the pertinent legal issues. Accordingly, it is respectfully submitted that the requirements of *Anders v. California, supra*, have been complied with.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED OR APPROPRIATE ALTERNATIVE RELIEF SHOULD BE AFFORDED THE APPELLANT.

Respectfully submitted,

DAVID SEGAL

Attorney for Appellant

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THE STATE OF NEW YORK
IN SENATE
JANUARY 1, 1901.

REPORT
OF THE
COMMISSIONERS OF THE LAND OFFICE
IN RESPONSE TO A RESOLUTION
PASSED BY THE SENATE
MAY 1, 1899.

ALBANY:
J. B. LEECH, STATE PRINTER.
1901.

SEGAL

AFFIDAVIT OF PERSONAL SERVICE

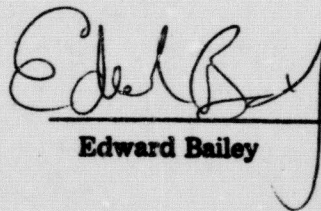
STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 17 day of April, 1978 at No. 1 St. Andrews Pl., NYC

deponent served the within *BRICK*
upon U.S. Atty., So. Dist. of NY

the Appellee herein, by delivering ³ true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me this
17 day of April 1978.


Edward Bailey


WILLIAM BAILEY
Notary Public, State of New York
No. 43-4661518
Qual. in Richmond County
Commission Expires March 30, 1979